No. 14,863

IN THE

United States Court of Appeals

For the Ninth Circuit

UNITED PRESS ASSOCIATIONS,
a corporation,
Appellant,

vs.

SIDNEY DEAN CHARLES, PAUL S. CHARLES, PATRICIA CHARLES and the PIONEER PRINTING CO., a corporation,
Appellees.

Upon Appeal from the District Court for the District of Alaska, First Division.

REPLY BRIEF FOR APPELLANT.

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PRELIMINARY CONSIDERATIONS.

Appellees, in their brief, have made certain statements and have advanced certain arguments which appellant believes should be answered. Hence, the purpose of this reply brief. The matters to which this brief will be directed are these:

1. The bold assertions that appellant, and not appellees, had breached the contract between the parties

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1. The bold assertions that appellant, and not appellees, had breached the contract between the parties

and that appellees were thus justified in rescinding it; and either (a) that the verdict on the issue of liability ought to have been for appellees, rather than for appellant, or (b) that the real "intent" of the jury was to decide this issue in appellees' favor.

2. The contentions that the ordering of a jury trial by the district judge on the eve of the trial (R. 25) was not error because—

(a) It constituted a reconsideration of appellees' motion under Rule 39, F.R.C.P., denied some six months previously (R. 25);

(b) That appellant had waived its objection to any possible error of the trial court in calling a jury by failing to request a postponement of the trial; or

(c) That it could be considered that the jury was merely advisory and that the trial court had simply adopted the verdict as its own findings of fact.

3. The claim that appellant cannot now assert that certain of the trial court's instructions were erroneous because appellant failed to object to them at the trial of this action.

4. The contention that appellant has no right to assert that the jury's award of damages was inadequate, because appellant failed to request a directed verdict.

5. The assertion that if there were any error on the part of the District Court it was really only "harmless error" (F.R.C.P., Rule 61), and thus would not justify a reversal by this Court.

1. THE ISSUE OF LIABILITY.

Appellees devote a large portion of their brief in trying to establish that appellant had continually furnished a poor news service, despite many complaints by appellees, and that because of this the latter were justified in arbitrarily renouncing the contract before its date of expiration. But the issue of liability for breach of the contract is not one that should be considered here. The jury had definite instructions as to what facts would justify a finding in favor of appellees, for as part of its Instruction No. 4 the District Court said:

> "* * * On the other hand if you find from a preponderance of the evidence that the plaintiff failed to furnish the defendants with the news agreed upon, then you would be warranted in finding that the defendants were justified in rescinding the contract and your verdict should be for the defendants." (R. 31.)

If the jury, under these ample instructions, had thought that appellant had breached the contract by not furnishing the kind of news service agreed upon, then it certainly would have said so. There were two forms of verdict—one providing for a finding "for the plaintiff", and the other providing for a finding "for the defendants" (R. 35-36); and these forms were in no way uncertain, confusing or ambiguous. Had the jury agreed with appellees' contentions on the issue of liability Verdict Number Two (R. 36) would certainly have been returned.

What appellees are doing then is attacking the verdict of the jury, for otherwise there would be no point in devoting such a large part of their brief in attempting to prove that appellant, and not they, had breached the contract. But this cannot be done here, because appellees made no motion under Rule 59 FRCP to set aside the verdict as against the weight of the evidence, and hence they cannot assert any abuse of discretion in the trial court in refusing to grant such a motion. See Moore's Federal Practice, Vol. 6, Section 59.08(5), p. 3816; id., p. 3820. Furthermore, even if appellees had protected their position in this matter by filing a motion for a new trial, or by having requested a directed verdict under Rule 50 FRCP, they did not obtain the allowance of a cross-appeal and therefore cannot confer jurisdiction on this Court to consider the question. See *United States v. American Railway Express Company,* 265 U.S. 425, 435; *Morley Company v. Maryland Casualty Company,* 300 U.S. 185, 191.

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2. THE ORDERING OF A JURY TRIAL.

Appellant submits that in its opening brief (see Brief for Appellant, pp. 12-21) it presented a complete case for the proposition that the District Court erred in ordering a jury trial, after a waiver thereof by appellees, and that this error was prejudicial. The District Court's sudden and completely surprising change of position on the eve of the trial (R. 25)

cannot logically be construed as a "renewal" by appellees or a "reconsideration" by the Court of appellees' motion under Rule 39—a motion which had been denied six months previously (R. 25, 46-47). The record shows beyond dispute that appellees' counsel was not, on April 12, 1955, renewing his motion for a jury trial (R. 50), and that the Court was not acting upon any request or motion, but solely on its own initiative (R. 25, 50).

Appellees maintain that a complete answer to appellant's claim of prejudice in this respect is that appellant did not ask for a postponement of the trial—until October, 1955. (Appellees' Brief, p. 14.) But in addition to the noticeable absence of legal authority supporting this purely gratuitous suggestion, it could hardly be considered a solution for the unenviable predicament in which appellant found itself on the day before the trial. Appellant's counsel resides at Juneau, Alaska, and its witness, David Belnap, at Seattle, Washington (R. 52), and both had gone to the expense of traveling to Ketchikan *before* any notice was given that the trial court did not mean to adhere to its ruling of September 24, 1954 when the motion for a jury trial had been denied. If a request for postponement had been made, and granted, then there would simply have been a duplication of these not inconsiderable expenses—expenses that would not have been recoverable and which would have added further loss to the substantial losses that appellant had already suffered through

appellees' breach of contract. Appellant was simply in a helpless situation that was wholly uninviting no matter which way it turned.

Finally, it cannot be considered that the jury's verdict was simply "advisory" and that the District Court had therefore adopted such verdict as its own findings. (See Appellees' Brief, pp. 16-18.) Rule 39, F.R.C.P. makes it abundantly clear that an advisory jury may be utilized in actions "not triable of right by a jury" (Rule 39(c)), and not, as in this case, where a demand for a jury trial may have been made of right but the right had been waived. Despite Professor Moore's "preference" in this matter (Moore's Federal Practice, Vol. 5, pp. 720-722, Section 39.10(1)), the decision of the Tenth Circuit in *Hargrove v. American Central Insurance Company,* 125 F. 2d 225, 228-229, is decisive of this issue; for there that Court said specifically that in circumstances such as we have here a Court is not authorized to call a jury, either on its own initiative or in an advisory capacity. And this was the precise viewpoint adopted by the District Court in this case, for after the trial was over the suggestion was made that perhaps the verdict could be considered as advisory, and that the Court could then disregard the verdict and enter its own independent findings of fact. But the District Court said on this:

> "* * * but the reason I think it would be futile to argue that the jury may be treated as advisory is because, if I am not mistaken, the law doesn't provide for an advisory jury except in actions

of an equitable nature. There is no authority whatever for empanelling an advisory jury except in an equity action."

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3. THE FAILURE TO OBJECT TO CERTAIN OF THE DISTRICT COURT'S INSTRUCTIONS TO THE JURY.

It is true that appellant's counsel objected to only one part of the trial court's instructions to the jury (R. 204-205), and that through inadvertence failed to object to other portions of the instructions, the giving of which appellant now assigns as error. (R. 268-269; Appellant's Brief, pp. 38-41.) But appellant submits that the alleged erroneous instructions were on matters that were material, and that therefore the failure of counsel to either request specific instructions or to take exception to those made cannot be adequate to absolve the trial court from its failure to properly charge the jury on the essential issues of the case. *Dowell v. Jowers,* 166 F. 2d 214, 221, cert. denied, 334 U.S. 832; cf. *Hormel v. Helvering,* 312 U.S. 552, 557; Moore's Federal Practice, Vol. 6, pp. 3779-3780, Section 59.08(2).

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4. THE FAILURE TO REQUEST A DIRECTED VERDICT.

After appellees have devoted a large part of their brief to the question of which party breached the contract, they then say that appellant cannot raise this issue because it failed to move for a directed verdict. It is true that there was no request for a

directed verdict, but that is of no consequence here because appellant is not raising the issue of breach of contract. Appellant's position on this appeal, as shown by its statement of points (R. 268-269) and from its opening brief, is that the jury correctly decided this issue in appellant's favor, but that it then failed to properly assess the monetary amount of damages to which appellant was entitled—either because the jury completely disregarded some of the District Court's instructions, or because of the fact that other of such instructions were improper or inadequate. This question of inadequacy of damages was first presented to the trial court by appellant's motion under Rule 59 F.R.C.P., as it ought to have been, and it is the trial court's refusal to correct this miscarriage of justice that appellant now claims is such an abuse of discretion as to justify appellate review. See *United Press Association v. National Newspaper Association,* 254 F. 284, 286 (CA-8 1918); *Reisburg v. Walters,* 111 F. 2d 595, 598 (CA-6 1940). Consequently, the absence of a motion for a directed verdict is not relevant here.

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5. HARMLESS ERROR?

The standard contained in Rule 61 F.R.C.P. whereby it can be determined whether the action of a trial court should be reversed is whether such action was "inconsistent with substantial justice"—whether or not the "substantial rights" of the parties have been affected. Appellant submits that what it

has asserted here as error is in no way "harmless"; that its substantial rights have been affected and that there has been a miscarriage of justice.

Whether the action of the jury in refusing to assess damages after awarding a verdict in appellant's favor was the result of arbitrary action in simply refusing to follow the trial court's instructions, or was caused by reason of inadequate or improper charges by the District Court, the fact remains that the issue of liability was decided against appellees, the monetary amount of damages to which appellant then became entitled was beyond dispute and was simply a matter of mathematical computation, and the trial court had ample opportunity to rectify the situation either by setting aside the verdict and entering judgment for appellant or by granting a new trial. (R. 39-40.) But the court refused to do this (R. 41), and it is this action that appellant contends is such an abuse of discretion as to justify a reversal by this Court. The District Court's handling of this situation can hardly be termed "harmless", when appellant is thereby deprived not only of the $21,489.57 in damages to which it is clearly entitled, but also of the considerable costs to which it has been put in this litigation.

CONCLUSION.

For the reasons stated in appellant's opening brief, and in this brief, it is respectfully submitted that the judgment of the District Court should be reversed,

and that this case should be remanded with direction to enter judgment in favor of appellant in the sun of $21,489.57, together with appellant's costs and attorneys' fees.

Dated, Juneau, Alaska,
February 28, 1956.

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